***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF

# 75-1402

*To be argued by*
JEFFREY C. HOFFMAN

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# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 75-1402**

UNITED STATES OF AMERICA,
*Appellee,*

—v.—

JOHN DARBY,
*Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

## APPELLANT'S BRIEF

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## PRELIMINARY STATEMENT

This is an appeal from the final judgment of conviction of the United States District Court for the Eastern District of New York (Mishler, C.J.) entered on December 19, 1975 after a jury trial convicting the defendant-appellant John Darby for conspiring to violate the federal narcotics laws (Title 21, United States Code, Sections 812, 841(a)(1) and Title 21, United States Code, Section 846) and for the unlawful use of a communication facility (five counts, Title 21, United States Code, Section 843(b) ).

The defendant was sentenced to a prison term of 15 years on Count 1 and 3 years each on the violations of Title 21, United States Code, Section 843(b). The terms of imprisonment relative to the violations of Title 21, United States Code, Section 843(b) were to run consecutive with each other but concurrently with the term of imprisonment imposed on Count 1.

## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the discharge of Juror Number Six on September 22, 1975 over the objections of all defense counsel constitute an abuse of discretion and thus require a new trial?

2. Did the government fail to show that normal investigative procedures were tried and failed or reasonably appeared to be unlikely to succeed if tried or too dangerous to employ in their application for a wiretap order as required by New York State Criminal Procedure Law Sections 70.15 Subdivision 4 and 700.20 Subdivision 2(d) and Title 18, United States Code, Section 2518(1)(c)(3)(c)?

3. Were the telephonic interceptions conducted in such a manner so as to fail to minimize the interception of communications as required by New York State Criminal Procedure Law Section 700.30(7) and Title 18, U.S.C. Section 2518(5)?

## STATEMENT OF THE CASE

1. The Government's Case

While the appellant does not challenge the sufficiency of the case presented against him by the government and is well aware that all of the evidence must be viewed in a light most favorable to the government [U.S. v. McCarthy, 473 F.2d 300, 302 (C.A.2, 1972)], a compendious review of the facts will serve the convenience of the Court. This review will also illustrate that while the government produced a great quantity of testimony concerning the appellant Darby, the quality was such that the errors which were committed require a reversal of his conviction.

The government's case against the appellant ranged from hearsay upon hearsay, to hearsay, to innuendoes, to alleged indirect deals, innocuous observations and finally, to alleged direct deals and the phone taps. Typical of the hearsay testimony presented against the appellant came from the likes of Norman Lee Coleman. Coleman testified that his sole personal knowledge of the appellant was that he had met him in the "Family Affair Bar" in Baltimore in

June or July of 1972 [TM 282],* and that he had seen him on five or six occasions before [TM 284]. However, Coleman was gracious enough to impart what he had allegedly heard from James Westley Carter, a defendant in this same case. Coleman said that Carter said that Darby, Frank Matthews, Mickey Beckwith, also a defendant in this same case, and he (Carter) were partners in selling narcotics. Needless to say, since Carter and Beckwith were defendants in this case, they did not take the stand, nor could they be called to the stand by the defendant Darby. The unavailability of Frank Matthews is second only to Judge Crater. On redirect, Coleman said that a person by the name of Reece Whiting said that he (Whiting), Liddy Jones and the appellant Darby were going to Las Vegas to meet with Frank Matthews concerning the purchase of drugs [TM 454-456]. One would expect that Whiting would corroborate such a devastating statement; however, when Whiting testified at the trial, he plainly stated that he had never discussed nar-

*The letters "TM" refer to Trial Minutes.

cotics with Mr. Darby [TM 2366]. Such a conflict between the hearsay testimony and the actual testimony given by the alleged maker of the statement was not unusual in this case. (Compare Daniel Barbee's testimony as to statements he attributed to William Fred Cameron and Cameron's actual testimony - Re: Marzella Webb.) Of course, on cross-examination Coleman admitted that he never dealt with or talked with the appellant concerning drugs, nor did he ever see the appellant in possession of drugs.

The government continued its presentation with the testimony of Thomas Lee Morehead, whose entire revelation consisted of the fact that in 1975 he had met the appellant in the Tip Top Bar in Brooklyn and the appellant was in the company of Mickey Beckwith [TM 710]. William Fred Cameron, despite all of his dealings with the Frank Matthews organization, plainly stated that he did not know the appellant [TM 1084]. And Donald James' sole contribution was that he also did not know the appellant, although he (James) had dealt extensively with the Frank

Matthews organization and that the only "Pop" that he knew of in the drug business was one Jerry Mims [TM 1302-1305].

Detective Joseph Kowalski, a New York City Police Officer, testified that he had had an apartment at 130 Clarkson Avenue in Brooklyn from 1969 to 1972 [TM 1475-1476]. The sum and substance of Kowalski's testimony was that he had seen the appellant move into the building assisted by Mickey Beckwith [TM 1497], and that on other occasions he had seen the appellant with Frank Matthews, who also lived at 130 Clarkson [TM 1482]. Capping these titillating observations was testimony concerning the appellant carrying the ever-present shopping bags and attaché cases. Such testimony concerning these omnipresent parcels often causes one to wonder whether or not our narcotics agents suffer from a severe case of déjà vu. On cross-examination the witness admitted that his observations of the appellant were no different than those he made of many other occupants in that building, and when he filed a report concerning the names of suspected drug dealers

and associates of Frank Matthews, John Darby's name was conspicuous by its absence [TM 1607].

No government case would be complete without the testimony of the irrepressible Dickey Diamond. To say that Mr. Diamond enlivened the Court as opposed to enlightening it would be a most accurate description of his testimony. Sandwiched between Diamond's recognizing Darby [TM 1878] and his unequivocal statement that he had never spoken to Darby [TM 2078] was one of Diamond's "Tales of Brownie's Bar". Diamond stated that some time in the summer of 1971 he was in Brownie's Bar when Darby came in with Ernie Robinson. Diamond left the bar because he had heard that Robinson was a police officer [TM 1940]. Approximately a month later in the same bar, Diamond saw Robinson, Darby and Frank Matthews go into the kitchen. He (Diamond) went in himself some time later. Upon entering the kitchen of Brownie's Bar, Diamond saw an attaché case full of money, which Frank Matthews later left with. The witness did not hear any of the conversations among the other parties.

The testimony of Percy Royster [TM 1335 et seq.] falls into a different category, in that the witness alleges both an indirect and direct sale of quinine (a narcotic dilutant) to the appellant. Royster testified that in late 1973 or early 1974 he had had a conversation with the appellant concerning the purchase of quinine [TM 1345]. That later, a transvestite named Dee Dee White telephoned him (Royster) and said that John Darby wanted to buy quinine. Subsequently, Royster went to Dee Dee's apartment and sold Dee Dee 5 ounces of quinine at $40.00 per ounce [TM 1349]. Sometime later, Royster testified, he sold 25 to 50 ounces of quinine directly to John Darby and was paid at a time subsequent to the transfer of quinine [TM 1350]. The testimony of Royster, in addition to being uncorroborated, runs completely afoul of his testimony given before a Federal Grand Jury in the Eastern District [TM 1365-1368; 1388-1391]. Further, Royster's memory is a rather malleable facility from which dates and times change like the chameleon [TM 1409-1409a]. It would appear that the witness (Royster), who had stated to the Assistant United States Attorney

(William Callahan), "I am not as devious and deceptive as the United States Government, sir, . . ." [TM 1394], had decided to see that he at least ran a close second.

The government's main witness against the appellant John Darby was Walter Rosenbaum. Despite the great volume of pages consumed by the testimony of Rosenbaum, the pertinent evidence which he imparted can be broken down into: (a) the mannite transaction; (b) discussions concerning the quinine transaction; (c) the introduction of Agent Maloney to Darby; and (d) the introduction of Agent Swint to Darby. The greater quantity of pages were consumed by the witness telling his usual three or four variations of the same story or the changing of facts and dates to suit the occasion.

(a) The Mannite Transaction: According to Rosenbaum, in April of 1972 Darby told him that he was having trouble getting mannite (a narcotic dilutant) [TM 2505]. Darby allegedly gave to Rosenbaum a mannite label bearing the name, Shiner's Drug Company, 117 East Canfield, Detroit, Michigan [GX 64].*

*The letters "GX" refer to Government's Exhibits.

Rosenbaum stated that he had called Shiner's, but that they were not interested in doing business, so that he subsequently contacted the Italian Trade Commission located in the World Trade Center in New York City, and asked them to provide the names of mannite distributors [TM 2511-2512]. Rosenbaum corresponded with Sant' Anna Progal in Genoa, Italy [GX 65A-D] and on June 7, 1972 they forwarded a quote on a mannite shipment. Rosenbaum testified that he then met with Darby, Frank Matthews and Mickey Beckwith at 130 Clarkson Avenue in Brooklyn, where among other things, they told Rosenbaum to order 25,000 blocks ($\frac{3}{4}$ ounce blocks) of mannite [TM 2516-2517]. Subsequently, Morris Reece, Darby's brother-in-law, came to Rosenbaum's office and brought funds to purchase a draft suitable for foreign transactions. A letter to the Genoa corporation, together with the bank draft, were introduced into evidence [GX 66 and 67; TM 2525-2526]. The shipment of mannite arrived in June of 1972 and according to Rosenbaum, was picked up at the dock by Morris Reece and then transported to the Community Grocery Store in Newark. The existence of the shipment from Italy was verified by GX 68A-68F, the shipping

documents from the Italian corporation, and GX 69, which was a voucher charge ($220.40) from a commission broker, Wolf D. Barth Company, Inc., for obtaining the release of the shipment from Customs.*

(b) The Quinine Transaction: Rosenbaum testified that at the meeting at 130 Clarkson where it was decided to order 25,000 blocks of mannite, Matthews, Beckwith and Darby also requested him to find a source of quinine, another narcotic dilutant [TM 2522]. Toward that end, Rosenbaum corresponded with the Genoa corporation concerning the purchase of more mannite and quinine [TM 2544-2546; GX 71, 72 and 73, letters of August 28, 1972 and September 2, 1972]. Rosenbaum stated that despite his efforts using his cousin's firm name, Mercury Chemical Company, he was unable to obtain any more mannite, or ever obtain any quinine through these methods. Rosenbaum testified that as late as June 26, 1973, he met with Darby and Frank Matthews in front of the Statler-Hilton Hotel in New York to discuss the purchase of quinine.

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*GX 70 consisted of the carrier's certificate of release of shipment.

(c) Introduction of Agent Maloney to Darby: On June 26, 1973, Rosenbaum met with Frank Matthews and John Darby outside of the Statler-Hilton Hotel in New York City. This meeting was observed by Bernard Sierra, a New York City Police Officer, who was alerted to the meeting by Walter Rosenbaum [TM 4015-4020]. Subsequently, Rosenbaum and Darby went to the International Motel near Kennedy Airport in Queens, New York, where they proceeded to a room occupied by Francis J. Maloney, an agent of the Drug Enforcement Administration.* Maloney, posing as a quinine salesman, entered into discussions with Darby concerning a potential purchase of quinine and some of the past dealings that Darby had allegedly had in the area of quinine transactions. No purchase was consummated, nor was any further contact had with Agent Maloney [TM 2854 et seq.].

(d) Introduction of Bennie Swint to Darby: On February 27, 1974, Walter Rosenbaum introduced Darby to Bennie Swint, an agent of the DEA. Swint was posing as a guard in a pharma-

*The arrival at the outside of the motel was observed by Sgt. William Raywald and a covering team [TM 3126].

ceutical house who could obtain quantities of quinine. Allegedly, after a brief conversation, Swint took Darby to his official government vehicle and removed a sample of quinine for Darby's testing and for Darby to keep [TM 2881-2883; 2922]. After agreeing to provide the quinine, Swint stated that he did not wish to travel all the way from New York to Philadelphia to deliver quinine. Allegedly, Darby wrote Lucy Mathews' telephone number on a piece of paper [GX 79] and told Swint to call her since she has a store in Newark where the quinine may be left. Swint testified that he telephoned Lucy Mathews on February 28, 1974 telling her that he had the "stuff" or "quinine" and that on March 1, 1974 he made the actual delivery to the Community Grocery Store in Newark, New Jersey to one Fred Brown. Upon the delivery of the quinine to Fred Brown, Mr. Brown handed Agent Swint a paper bag containing $4,000 and on the paper bag was written "Pop." Further, in Agent Swint's presence, Brown did remove $100.00 from the $4,000, stating that Darby told him to take $100.00 [GX 82A, $3,900; GX 82B, paper bag].

While it may appear that Rosenbaum's testimony was devastating to Darby, an analysis of what was developed on cross-examination and even redirect examination of the witness clearly indicates inherent unreliability of the testimony concerning these incidents. The cross-examination concerning the mannite transaction produced answers which typified the prevarications of Mr. Rosenbaum. Inasmuch as it had developed that Mr. Rosenbaum was a government informer for a considerable period of time, it became important to determine precisely when that cooperation began. On direct examination, Rosenbaum stated that he began to cooperate in late 1972 or early 1973 [TM 2559]. He reiterated this position on cross-examination, stating that he was cooperating in the summer of 1972 [TM 2614]. The development of these factors achieves more importance when one considers that on April 18, 1973, Rosenbaum stated in an interview to two Internal Revenue Service agents (Gerald Brown and Frank Monahan) that James Martinez, another defendant in this case, was the party responsible for the entire mannite transaction [TM 2637-2641]. Cert-

ainly not one to be constrained by loyalties or the facts, Mr. Rosenbaum subsequently testified that he had lied to the I.R.S. agents at the behest of Darby [TM 2693-2694], just as he had taken the Fifth Amendment before the Grand Jury at Darby's insistence [TM 2557]. However, since this would be inconsistent with his position of being a cooperating government informant, Mr. Rosenbaum later changed the time when he began cooperating with the government to May of 1973 [TM 2750]. Rosenbaum was completely undaunted upon being confronted with the fact that he had offered to make an undercover purchase of a narcotic dilutant for Drug Enforcement Administration Agents Walker and Miller on June 19, 1972 [TM 2785-2788].* The witness merely sloughed off these facts since the agents would not let him keep the $50,000 or $5,000 [see TM 2824] as a time when he was not "fully" cooperating [TM 2750]. If these inconsistencies and indeed almost insults to the Court and the jury's intelligence were not enough, Rosenbaum began on his

*This contact was made after the original mannite was ordered but before its delivery, so that Rosenbaum could profit from either result [TM 2747].

trilogy concerning the reasons he sold a store to Darby. Initially, on direct examination by the government attorney, Rosenbaum stated that he had sold a store to Darby so that Darby could report his gambling winnings in Vegas on which he had not paid taxes [TM 2704-2707]. However, at the close of that day's testimony, August 20, 1975, it became apparent that Rosenbaum had not given the answer the government desired, so he repaired to the office of the United States Attorney to "discuss" the next day's proceedings. Most assuredly, come the morn of August 21, 1975, Mr. Rosenbaum stated unequivocally that he sold the store to Darby so that Darby could legitimate the money he earned from narcotics trafficking [TM 2755]. However, later that day, evidently not wishing to hurt anyone's feelings, Mr. Rosenbaum continued his policy of appeasement by stating that the real, real, real reason he sold the store to Darby was so that Darby could legitimate both the money he had from gambling and the money he earned from narcotics trafficking [TM 2827].

Such testimony surely prompted the Court to invoke the name of Mr. Rosenbaum in rebuking one of defense counsel with

the retort: "You're like Mr. Rosenbaum. You don't answer the question." [TM 2726]. Or perhaps the analysis of Mr. Rosenbaum's testimony by Mr. Hoffman would be more accurate, when he offered an alternative to the Court's suggestion that the witness was "confused or frightened" - Mr. Hoffman: "Or maybe untruthful." [TM 2708]. However, Mr. Rosenbaum, not willing to leave the condition of his mental processes in the throes of doubt, unequivocally stated: "Absolutely. I am well aware when I am lying and when I am telling the truth." [TM 2691]. Perhaps the witness could have further enlightened the proceedings by indicating when one of these alternatives occurred during his testimony.

Throughout the entire events concerning the mannite purchase, no name appeared anywhere on any irrefutable document but that of Walter Rosenbaum. And when examined concerning Government Exhibits 95, 94 and 89, which were handwritten notations concerning the transaction seized from Apartment 7-J at 130 Clarkson [TM 3122-3125], Rosenbaum admitted that Government's Exhibit 95 was in his handwriting, but that the other two

(94 and 89) were not. Needless to say, the implication was that the remaining two documents were written by the appellant Darby. However, the unimpeachable testimony of Joseph P. McNally, a retired New York City Police Captain and a nationally recognized handwriting expert, clearly stated that all three documents were written by the same individual. Hence, the inescapable conclusion that the author was Walter Rosenbaum.

While it may appear that the transactions relative to the purchase of quinine have some substantial corroboration to support the testimony of Rosenbaum, a careful analysis of these instances will show that unimpeachable evidence could have been gotten, yet by inadvertence or design, was not. The entire incident of June 26, 1973 was as a result of the activities of Walter Rosenbaum. As Detective Sierra testified, the authorities were alerted to a meeting outside of the Statler-Hilton Hotel in New York concerning Walter Rosenbaum, John Darby and Frank Matthews. As a result, they had a covering officer (Detective Sierra) to observe and corroborate the existence of this meeting [TM 4015-4020].

Further, it was planned that later on June 26, 1973, Walter Rosenbaum would introduce Darby to Agent Maloney, who would have assumed the cover of a quinine salesman staying at the International Motel in Queens, New York [TM 2563]. But strangely, although the government was aware that Darby was coming and obviously as to what room Maloney would be in, no recording device was placed on the person of Agent Maloney, or in the room. Thus, we have a strange avoidance of an opportunity to capture irrefutable evidence, from out of the mouth of the appellant himself, of his alleged criminal intentions. Not only did the government pass up this opportunity and every other opportunity to record a conversation between Rosenbaum and Darby during Rosenbaum's "full cooperation days," but they continued this strong reluctance with regard to the activities of Agent Swint. Thus, on February 27, 1974, when Rosenbaum introduced Agent Swint to Darby [TM 2881], no recording device was used to capture the alleged statements of the appellant. This is of particular importance in the case of Agent Swint,

whose testimony seems to be continually at odds with the recorded word. Accordingly, when Agent Swint testified on direct examination that he used the words "stuff" or "quinine" when he phoned Lucy Mathews on February 28, 1974 [TM 2892-2894], he was clearly contradicted by a playing of the tape of that phone conversation which indicated that he used neither the word "stuff" nor the word "quinine" [TM 2966-2968]. Perhaps it was this contradiction that led to the decision not to record the conversations which Agent Swint allegedly had with the defendant Bates on June 4 and June 19, 1974 [TM 2908-2920].

Part of the government's case also consisted of observations of the appellant's nightly peregrinations. The most important of these observations would be those of December 8, 1973 and January 16, 1974.

December 8, 1973: Placing the testimony of DEA agents Bennie Swint, Jr. [TM 2872-2879] and Gerard James Miller* together with that of Charles Bruno, a Philadelphia detective [TM 3011-3017], the observations of December 8, 1973 consisted of

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*[TM 3945-3949]

following Darby and Ernie Robinson from Philadelphia to New York, where Darby parked his car in a lot at 49th Street and Eighth Avenue. Subsequently, a vehicle driven by Donald Conners parked nearby. It appeared that "packages" were then transferred from the trunk of one vehicle to the other. A short time later, the appellant Darby used a phone booth at 42nd Street and Eighth Avenue, at which time Agent Swint went to a phone booth next to the one used by Darby and heard Darby say: "Have the money. I want to see the boy." [TM 2878]. Swint testified that "boy" meant heroin.*

January 16, 1974: Placing the testimony of Walter Hausman, a Philadelphia policeman [TM 2971 et seq.], Charles Bruno, a Philadelphia policeman [TM 3018 et seq.], Sgt. William

*Darby must have been oblivious to these observations and certainly to the presence of Agent Swint, in that some two months later Agent Swint was to approach Darby in an undercover capacity as a guard in a pharmaceutical house (February 27, 1974). Further, since Donald Conners was alleged by the government to be running the Matthews organization and Darby had just met him in the parking lot, who could he be calling? - Walter Rosenbaum?

Raywald, a New York City policeman [TM 3126-3127], Richard A. Compton, a DEA agent [TM 3221 et seq.], Robert Richel, Special Agent, DEA [TM 3270 et seq.], and Roger Garay, a New York City police officer [TM 3441-3446] in juxtaposition to one another, the observations of January 16, 1974 consisted of following Darby and Ernie Robinson from Philadelphia to Newark, where they stopped in the area of 122 Sherman Avenue, and after visiting the M & M Bar they went into the Community Grocery Store located at 122 Sherman Avenue. Darby and Robinson were then surveilled to Evelyn's Bar in Brooklyn and then to 1365 St. John's Place in Brooklyn, which is Dee Dee White's home. The defendant Robinson was then observed to leave 1365 St. John's Place, open the trunk of the car in which he and Darby were riding, remove a package and hand it to Donald Conners, whose car was parked alongside the Darby vehicle. Conners then drove to the next intersection, exited his vehicle and placed that package into the trunk of his car. Subsequently, Conners was surveilled returning to his home at 2785 Ocean Parkway.

Other surveillances consisted of Darby being at or entering 101 East 56th Street and 7 Buttonwood Road (Frank Matthews'

residence) [August 31, 1972, Ernest Mahone, TM 3786 and September 1, 1972, Sgt. Raywald, TM 3109]. The appellant was also seen on the balcony of his apartment at 130 Clarkson on September 6, 1972, after Gattis Hinton and Robert Howard entered 130 Clarkson, having recently left 7 Buttonwood with a large yellow cellophane wrapped bag. Hinton and Howard were later seen leaving 130 Clarkson with suitcases [TM 3377]. On September 6, 1973 the appellant was seen with Barbara Hinton and Donald Conners at the Crillon Motel in Atlantic City [TM 3941].

The government also introduced into evidence the results of the search of Apartment 7-J at 130 Clarkson (September 15, 1972) [GX 85-95 and $14,683 (previously given to I.R.S.); TM 3120], and the search of Darby when he was arrested on this case, February 20, 1975, by Officer Hausman [GX 83A-83M; TM 2985-2988]. While the seizures of evidence taken from 101 East 56th Street (September 15, 1972) were introduced against all defendants [TM 3802 et seq.], only one item could even remotely be said to have a connection with Darby — GX 112. This exhibit was the stub of a check on which was written: 'September 2, 1972. I owe Pop

Smith 26,000 plus 15,000 [with a line underneath the two figures and the total entered of] 41,000." [TM 3639].* No testimony was ever elicited showing that "Pop Smith" was in fact John Darby. Moreover, the evidence at the trial would indicate such a plethora of nick-names and code names that an accurate translation beyond conjecture and surmise was impossible. Even though the seizures at 101 East 56th Street were impressive as to quantity, the connection as to all but Beckwith was tenuous. All of the surveilling agents testified that there were six apartments in the building. The ground floor, which was occupied by the defendant Beckwith, had two apartments. One apartment was furnished just like any normal apartment (front apartment), while the other (rear apartment) contained all of the narcotics paraphernalia. It was clear from all of the testimony that it could not be determined to which of these two apartments, or for that matter six apartments, an entrant into 101 East 56th Street would go.

With the exclusion of the phone taps, the case against John

*There was a stipulation that GX 112 was in Mickey Beckwith's handwriting [TM 7094].

Darby was completed with a series of stipulations as to expenditures, phone numbers and phone calls [TM 4526-4624].

The Phone Taps

The evidence pertaining to the telephone counts consisted mainly of five conversations which can be rather accurately synopsized in the following form:*

Count 4 - September 1, 1972

Between: Barbara Hinton and John Darby

"Tomato crew." [TM 4317]

Count 5 - September 5, 1972

Between: Frank Matthews and John Darby

"Scoop it up." [TM 4324]

Count 6 - September 6, 1972

Between: Frank Matthews and John Darby

"Paper work." [TM 4326]

*Although not a count of the indictment, an additional conversation was introduced into evidence, that of July 15, 1972, between Nat Elder and John Darby: "Man, man, there ain't nothing." [TM 4307].

Count 7 - September 7, 1972

Between: Frank Matthews and John Darby

"The thing." [TM 4347]

Count 8 - September 11, 1972

Between: Frank Matthews and John Darby

"Rev left suitcases." [TM 4335]

All of these conversations were introduced through the testimony of Police Officer Roger Garay. Officer Garay identified one of the speakers in each of these conversations as being John Darby. He further testified that the portion presented in quotes in the above outline had a narcotic meaning. But even this testimony, as impregnable as it may seem, was the subject of successful cross-examination. Garay, who had drawn upon his expertise in the narcotics field to give a narcotics meaning to the various conversations entered into evidence, admitted that he had previously ascribed a narcotics meaning to a conversation involving the appellant Darby which turned out to be a perfectly innocent conversation with no narcotics connotations at all. In fact, Garay admitted that the conversation which mentioned "shares" he had

interpreted as a narcotics conversation until he was told what it really meant by Walter Rosenbaum [TM 4445]. Again, the innate untrustworthiness of this type of testimony which must necessarily presume the guilt of the speakers is clearly demonstrated.

In an even more important vein was the cross-examination relative to Garay's identification of Darby's voice and his plainly inconsistent prior testimony. When Garay was recalled to the stand [TM 5972], he was cross-examined as to whether or not the testimony he gave before Justice Sullivan in the Bronx County Supreme Court in a search warrant application was different from that which he had given in this trial. Essentially, his testimony before Justice Sullivan had identified the speakers on the September 7, 1972 conversation ("The thing") as Mickey Beckwith and Frank Matthews, whereas in the present trial, he had identified the speakers as John Darby and Frank Matthews. Garay admitted that his testimony in the instant case was different from that given before Justice Sullivan in the Bronx County Court on September 8, 1972 [TM 5980]. However, when the Assistant United States Attorney questioned him, Garay alibied that the reason for his inaccuracy before Justice Sullivan was that he had gotten the information from

a Police Officer Schact, and that he really did not hear the voices himself prior to his testimony of September 8, 1972 before Justice Sullivan [TM 5982]. Further cross-examination by Mr. Bishop, Mr. Beckwith's attorney, saw Garay admit that he had told Justice Sullivan under oath that he (Garay) had intercepted the call and that he had never mentioned Patrolman Schact during the application for the Bronx County warrant [TM 5986]. Although it was evident that Garay had at the very least deceived Justice Sullivan, and that his testimony in the present trial was certainly inconsistent with that which was produced before Justice Sullivan, the Assistant United States Attorney made one more attempt to rehabilitate his witness. Garay, under further questioning by the Assistant United States Attorney, claimed that his errors could be attributed to the fact that he had never reviewed his testimony before Justice Sullivan until this very morning, September 22, 1975. Here again, Garay was confronted with the irrefutable fact that on October 24, 1973, the first trial of Mickey Beckwith before Judge Orrin Judd, he was cross-examined concerning the testimony he gave before Justice Sullivan in Bronx County [TM 6046]. From then on, the witness lapsed into a safer explana-

tion of his varied testimony, the ever-popular retreat: "I am confused - I don't remember."

2. The Defendant's Case.

The defendant Darby did not testify in his own behalf and called only one witness, Joseph P. McNally, a handwriting expert, whose testimony is referred to in the discussion of the government's case.

## ARGUMENT

### POINT I

THE DISCHARGE OF JUROR NUMBER SIX ON SEPTEMBER 22, 1975 OVER THE OBJECTION OF ALL DEFENSE COUNSEL CONSTITUTED A DENIAL OF DUE PROCESS AND THUS REQUIRES THE GRANTING OF A NEW TRIAL.

It is axiomatic in our system of jurisprudence that a defendant is entitled to a verdict by a jury whose members have been chosen by the litigants in accordance with due process and the Federal Rules of Criminal Procedure. And it is equally fundamental that the jury as selected should remain so constituted

unless by inability or impairment an alternate must be substituted. While the Federal Rules of Criminal Procedure (Rules 24, 24(c)) provide for the court's ability to substitute an alternate juror for a regular juror, it is clear that this right is not an unfettered power, but one bound by the limitations of reasonable cause.

While the appellant is well aware that this circuit has granted wide discretion to the trial court in the substituting of alternate jurors for regular jurors, the facts of this case so amply demonstrate an abuse of discretion and a denial of due process so as to require the granting of a new trial.

On September 22, 1975 Juror Number Six, Lorraine Jaffe, had reported to the Clerk of the Court that when she went to cash her paycheck, one of the tellers at the Bankers Trust branch located at Gold and John Streets indicated that she knew Mrs. Jaffe was a juror in the Frank Matthews case because her boyfriend, Scarvey McCargo, was a defendant [TM 5948-5971]. Immediately upon receiving word of this incident, the Court inquired of Mr. Sunden, Mr. McCargo's counsel, and Mr. McCargo,

whether or not they were aware of this incident and precisely what role, if any, did Mr. McCargo play. Mr. Sunden informed the Court that Mr. McCargo knew who the woman was (Brenda Warner) because she had informed him (McCargo) of speaking to the juror. However, Mr. McCargo did not in any way initiate or promote this contact [TM 5952]. Apparently satisfied with Mr. Sunden's response, the Court continued its interrogation of Juror Number Six. It developed that Mrs. Jaffe had told the other jurors of her conversation with the woman teller at Bankers Trust, but did not identify the defendant to them [TM 5949]. Further, Mrs. Jaffe's clear and unequivocal attitude was that the incident was of no moment; she would'rather see the thing through to the end," and that she was not in the slightest way prejudiced or intimidated [TM 5949; 5953-5954; 5962-5963].

While the failure to remove a juror who may have become hostile to a defendant by virtue of a communication or contact requires a reversal [Remmer v. United States, 350 U.S. 377, 76 S.Ct. 425 (1956); Gold v. United States, 352 U.S. 985, 77 S.Ct. 378 (1957)], it is equally important that a juror not be removed

without reason, thus creating a false impression among the remaining jurors that an attempt to tamper with the jury has been made. With all of the wide latitude afforded the trial court in the replacement of regular jurors with alternate jurors, no case permits an arbitrary and capricious substitution of an alternate juror where the regular juror is so clearly unimpaired and whose removal would unquestionably leave the remaining jurors with the implication that an attempt has been made to "fix" the jury. Mrs. Jaffe was thoroughly interrogated by the Court as to the results of her conversation with Brenda Warner and there can be no doubt that Mrs. Jaffe was totally unaffected. Despite the Court's persistent inquiry in an effort to develop some impairment, Mrs. Jaffe voiced that her sole reason for being upset was that she had put a lot of time and effort into this trial and she did not want to be disqualified. Mrs. Jaffe indicated no prejudice to anybody in the case and a desire to continue her service. Further, upon her relating the incident devoid of the defendant's name to her fellow jurors, her fellow jurors indicated that they did not

think she would have to be excused [TM 5953-5954]. What effect must Mrs. Jaffe's removal have had upon her fellow jurors? With what impression must they have been left after the Court's action in removing Mrs. Jaffe? The record reflects that all defense counsel agreed to allow Mrs. Jaffe to remain and indeed, could see the prejudicial effect if she were removed under these circumstances. The unanimity of response and evidently the responses of Mrs. Jaffe, instead of prompting the Court to the obvious course of action of allowing the juror to remain, merely piqued the Court, who seemed determined to discharge the juror [TM 5956]. In fact, throughout the entire acrimonious debate, it took but one word from the Assistant United States Attorney and the juror was excused [TM 5958].

While a reading of United States v. Domenech, 476 F.2d 1229 (C.A.2, 1973), United States v. Floyd, 496 F.2d 982 (C.A. 2, 1974), United States v. Maxwell, 383 F.2d 437 (C.A.2, 1967), United States v. Gottfried, 165 F.2d 360 (C.A.2, 1948) and United States v. Ellenbogen, 365 F.2d 982 (C.A.2, 1966) may seem to support the theory which the government will undoubtedly

espouse, that the trial court's great latitude in these matters covers the situation, the underlying theme of all of these cases is that there must be a reasonable cause for the substitution of a juror and even if the cause is not reasonable, the party claiming to be injured by such action is entitled to a new trial only upon a clear showing of prejudice to him. Thus, in Domenech, supra, the action of the District Court was certainly not a reasonable one, but the defendant was unable to demonstrate any prejudice. In Floyd, supra, the juror's own statements clearly indicated that he was unable to continue in an impartial capacity. In Gottfried, supra, it would appear that the defendant's motion was well taken but untimely. In our instant case, the actions of the District Court were not reasonable, the defendant can demonstrate his prejudice, and his objections were made timely. Mrs. Jaffe's answers given to the Court's interrogatories were those of a responsible juror, well aware of her duties, and perfectly prepared to proceed with the matter on which she had so long served. Despite the inimical prodding by the Court in an obvious attempt to secure answers which would support its

predetermined course, the juror remained steadfast and proper, thus frustrating the Court's spurious actions. The minutes amply demonstrate that the Court desparately wished to develop grounds to discharge Mrs. Jaffe, but was frustrated by her honest and straightforward responses which indicated that she was a perfectly competent juror. In fact, the Court went so far as to deliberately misinterpret the juror's answers, and when called to task by one of the defense counsel, who asked that the record be read back, sarcastically refused this reasonable request and suggested that the issue be made "Point 53" in the appeal [TM 5960-5961]. This clearly abusive action by the trial court constitutes an unwarranted intrusion upon the selection of the jury. Such action prevents a defendant from receiving a verdict from duly selected jurors and permits the Court unbridled discretion in substituting its choice for that of the litigant. Such conduct is not within the prerogative of the trial court and indeed usurps the function of a trial by jury. Further, Mrs. Jaffe's communication of these factors to her fellow jurors and their response indicating that such a minor incident would not cause her removal should have further alerted the Court to the dire

consequences of the juror's removal as it most certainly did to all of the defense counsel. The prejudice is clear. Her removal by the trial court magnified the incident out of all proportion and unquestionably caused the remaining jurors to interpret the contact in a new and detrimental manner. The only other way to demonstrate prejudice to the defendant would be to have inquired of Mrs. Jaffe how she would have voted — and this stone was not left unturned by defense counsel, for in an effort to demonstrate such further prejudice, one of the defense counsel posed that question to Mrs. Jaffe, but was interrupted by the Court [TM 5963]. Needless to say, the objections and motions by defense counsel were all timely made.

The factors in this case are truly unique. If the selection of the jury is to continue to have meaning, then the actions of the trial court with regard to the substitution of jurors must not be made in total disregard of the facts and circumstances as they exist. Nor should a case like this be shunted aside with the oft-cited cliche that to err on the side of caution is not to err at all. Mrs. Jaffe, Juror Number Six, demonstrated the highest skills

of an impartial juror, yet was discharged without reasonable cause to the prejudice of the defendants and over the timely objection of their counsel. If such a clear abuse of due process does not warrant the granting of a new trial, then the total selection of the jury may as well be left to the "discretion" of the trial court.

## POINT II

THE LOWER COURT ERRED IN NOT GRANTING THE APPELLANT'S PRE-TRIAL MOTION TO SUPPRESS THE WIRETAP EVIDENCE EMANATING FROM THE ORDER OF JUNE 27, 1972 AND SUBSEQUENT ORDERS IN THAT THE GOVERNMENT HAD FAILED TO SHOW AS A PREREQUISITE FOR THE INTERCEPTION ORDER THAT NORMAL INVESTIGATIVE TECHNIQUES WERE UNAVAILING.*

On April 24, 1975, the appellant together with other defendants moved the Court for an order suppressing the fruits of a wiretap order dated June 27, 1972 authorizing electronic interceptions on telephone number 212-884-2043. This order was signed by the Honorable William A. Kapelman, a Justice of the Supreme Court, Bronx County. The order of June 27, 1972 was the "parent tap" which resulted in a subsequent order signed by the Honorable

*RA # 98 (RA refers to Index to Record on Appeal).

Samuel Rabin, Presiding Justice of the Appellate Division, Second Department, authorizing interceptions pertaining to telephone number 212-979-4022. It was the interceptions on these two phones which were the evidence introduced at the trial. It is the appellant's contention that the New York State Criminal Procedure Law Sections 700.15, Subdivision 4, and 700.20, Subdivision 2(d) and Federal statutes Title 18, United States Code, Section 2518(1)(c)(3)(c) demand that in any affidavit requesting an order of telephonic interception there must be a clear demonstration that normal investigative techniques were tried and failed or reasonably appear to be unlikely to succeed if tried, or are too dangerous to employ. For the convenience of the Court, this argument has been divided into two sections: The Law, and The Facts.

The Law

It has become a fundamental principle since Katz v. United States, 88 S.Ct. 507 (1967) and Berger v. New York, 87 S.Ct. 1873 (1967) that wiretapping is not only a delicate issue, but one which greatly exceeds the power granted the government under the Fourth Amendment and as such must be used sparingly.

The provisions of Title III were clearly aimed at enacting legislation which would be compatible with the dictates of the United States Supreme Court opinions in Katz and Berger. The items to be present in an application are clearly delineated in the statute and the requirements set forth therein are certainly not to be taken lightly or ignored.

It would appear from some decisions rendered in the District Courts and certain Circuit Courts of Appeals that the provisions of both the New York State law and Federal law with regard to the requirement that wiretapping is not to be used unless normal investigative techniques are unsuccessful, unemployable or dangerous, exist merely to occupy a portion of paper which would have otherwise been blank and require no more heed than a mere administrative technicality such as who in the Office of the Attorney General actually approved an application. United States v. Giordano, 94 S.Ct. 1820 (1974). The opinions of the United States Supreme Court clearly have relegated wiretapping to the category of a unique tool whose availability should occur under very limited circumstances. Further, the statutes which control the issue of wiretap orders are to be

construed in a strict manner, and the courts must demand full and complete compliance before the awesome power of electronic surveillance is to be granted to any law enforcement agency. If this were not perfectly clear from Katz and Berger, supra, (see also Alderman v. United States, 394 U.S. 165, 89 S.Ct. 961 (1969) ), then the distinction made by the United States Supreme Court in the use before grand juries of illegally seized fruits by means other than illegal wiretaps (see U.S. v. Calandra, 94 S.Ct. 613 (1974) ), as opposed to those seized by illegal wiretaps (see Gelbard v. United States, 92 S.Ct. 2357 (1972) ) should surely have brought the point home to even the most prosecution-minded of courts. The very limiting standards set forth in the appropriate legislations require a showing that other means of investigation are unavailing. There obviously exists a wide variety of investigative techniques other than wiretapping. Among those most often alluded to in court opinions consist of physical and oral surveillance, the use of confidential informants, the granting of immunity to some of the suspected individuals and their questioning in a grand jury, a collection and compilation of data available through search warrants, as well as that avail-

able from police files and telephone files. The many years of the successful use of these normal investigative techniques during the period before the development of such sophisticated electronic surveillance equipment adequately demonstrates that in the vast majority of cases, a wiretap order is unnecessary and indeed under present legislation, illegal. Therefore, with this in mind, the statute required a showing of need before this extraordinary remedy could be resorted to, and that this showing must be made in a full and complete statement of facts.

As stated earlier, it would appear that some courts have chosen to ignore this section of law and have held that the mere parroting of standard conclusory phrases will satisfy the statute without any demonstration that other techniques were unavailing. Such courts have found that the statutes do not require the government to use a wiretap only as a last resort, and that while there may be a burden upon the government to show that normal investigative techniques would be unproductive or dangerous, the burden is not a great one. See United States v. Staino, 358 F. Supp. 852 (E.D. Pa. 1973); United States v.

Pacheco, 489 F.2d 554 (C.A.5, 1974); and United States v. Whitaker, 343 F.Supp. 358 (E.D.Pa. 1972). These decisions certainly run afoul not only of the clear and explicit language of the statute, but also of the fundamental reluctance in this country to permit the indiscriminate and unchecked use of the terrifying power of sophisticated electronic surveillance. Indeed, many well reasoned opinions take great heed of these particular sections and carefully observe the admonitions of the statute, granting a wiretap application solely where the unique facts of the case call for the use of this extraordinary measure. In United States v. Bleau, 363 F.Supp. 438 (D.C. Md. 1973) the District Court in a successful anticipation of the United States Supreme Court decision in United States v. Kahn, 94 S.Ct. 977 (1974) stated its agreement with the dissenting opinion of Judge Stevens in the Seventh Circuit Court of Appeals (U.S. v. Kahn, 471 F.2d 191), stating at page 441:

> "Having considered both positions expressed in Kahn, this Court is persuaded that Judge Stevens is correct. Sections 2518(1)(c) and 2518(3)(c) and not Sections 2518(1)(b)(iv) and 2518(4)(a) impose the exhaustion of techniques requirement upon the government."

Needless to say, however, our present litigation does not concern itself with Sections 2518(1)(b)(iv) and (4)(a) [CPL §§ 700.15 Subd. 2 and 700.20 (2)(b)(iv)], but with Title 18, U.S.C. Section 2518(1)(c) and (3)(c) [CPL §§ 700.15 Subd. 4 and 700.20 Subd. 2(d)]. Hence, while the United States Supreme Court in United States v. Kahn, supra, indicated that an investigation of "persons unknown" is not necessary to suffice those sections concerned with the identity of the callers, they nonetheless in Footnote 12 clearly reminded the judiciary that such was not the case with regard to (1)(c) and (3)(c) [CPL §§ 700.15 Subd. 4 and 700.20 Subd. 2(b)]. As the Court said in Footnote 12:

> "This language, however, is designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime. See generally S. Rep. No. 1097, 90th Cong. 2d Sess. 101 U.S.C. Cong. and Administrative News 1968, Page 2112."

The language chosen by the United States Supreme Court in Kahn is: "would suffice to expose the crime." Our highest court did not say: to gather more evidence, to make it easier to obtain a conviction, to see how much evidence can be gotten, or to cor-

roborate that which has already been gotten. The attitude of the Supreme Court has been adopted by a great many courts who have restricted the issuance of wiretap orders to unique cases. The New York State Courts have been particularly reluctant to grant roving electronic commissions. In People v. Holder, 331 N.Y.S.2d 557 (S.Ct. Nassau County, 1972), the Nassau County Court was very careful to show that because the incident involved anonymous telephone calls at early morning hours, standard surveillance and general interrogation and questioning would be futile, and the only possible means of obtaining the evidence was a wiretap. Similar reasoning calling for a strict and technical interpretation of the wiretap statutes, since they go beyond what the Fourth Amendment would normally allow, are present in People v. Tartt, 336 N.Y.S.2d 919 (S.Ct., Erie County, 1972); People v. Kenredy, 347 N.Y.S.2d 327 (Greene County Court, 1973 [citing U.S. v. Giordano, supra]; and People v. Seney, 34 N.Y.2d 817 (1974).

So too, some federal courts have limited the issuance of wiretap orders to factually unique cases. See United States

v. James, 494 F.2d 1007 (C.A.D.C. 1974);* United States v. King, 335 F.Supp. 523 (S.D.Cal. 1971);** and United States v. Bob[illegible], 477 F.2d 974 (C.A.4, 1973).*** As the Circuit Court of Appeals said in United States v. Giordano, 469 F.2d 522, 531:

> "Similarly, when the government consistently tramples upon those parts of the law that do not suit its momentary purpose and seeks to justify its conduct by sophistic argumentation, neither respect for the law nor societal order is promoted."

So, too, the Circuit Court of Appeals in United States v. King, 478 F.2d 494 (C.A.9, 1973) reminded us the procedures of the

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*The Court held that normal techniques and infiltration had been shown to be frustrated by the defendant's extreme caution.

**The government would be required to follow a sailing vessel for hundreds of miles on the open seas between Mexico and the United States without being detected.

***The government demonstrated the uniqueness of gambling cases whose activities are virtually confined to the telephone and the inability to establish the "interstate quality" of the conversations without a tap, since records normally seized in gambling raids are difficult to interpret.

wiretap legislation were designed to protect the general public from abuse of awesome power of electronic surveillance rather than to protect the rights of defendants involved. With this legal background in mind, it is clear to see from an analysis of the facts of this case that normal investigative techniques were neither unavailing nor dangerous and indeed, had produced an overwhelmingly airtight case against the defendants. Hence, no wiretap orders should have been permitted.

The Facts

In the application for an order granting interception of telephonic communications over the telephonic instrument bearing the number 212-884-2043 (parent tap), the State put forth a most extraordinary and complete set of facts to establish probable cause. The major portion of these facts was contained in the affidavit of Patrolman Roger Garay, Shield No. 15756, and the testimony of confidential informant Norman Coleman given before Justice William A. Kapelman on June 27, 1972 in the Supreme Court, Bronx County. While Garay's affidavit and the testimony of Coleman are part of the record in this case,* an

*Exhibits in RA # 58.

outline of the facts would serve to highlight the complete success achieved by normal surveillance and investigative techniques.

Garay's affidavit is divided into three categories: (1) the background and surveillance activities of Matthews and his associates; (2) the information obtained from a confidential informant (Norman Coleman); and (3) information gathered through telephone toll records. The initial surveillance began in April of 1971 by Detective J. Kowalski, Shield No. 1419, who along with his compatriots, observed various persons in autos frequenting 130 Clarkson Avenue in Brooklyn. From these observations, the State obtained names, license plates, registered owners, and a wide variety of information concerning those persons who were in constant contact with Matthews at the 130 Clarkson Avenue address, including the fact that the car driven by Matthews was registered in the name of his paramour, Barbara Hinton. Further details of these observations are listed in Garay's affidavit, Paragraphs 6 and 7.

The phone company records showed that the phone in question (212-884-2043) was registered to the eight year old son

of Barbara Hinton, and toll call records indicated that it was used to constantly contact James Perry Cravens of Ann, Ohio, James T. Westcott of Baltimore, Maryland, and James Westley Carter, of Baltimore, Maryland. The follow-up investigation through records, information and reports obtained from the various federal and state agencies indicated that Cravens was a large-scale, multi-kilo dealer who received his phone calls at a residence listed under the name of Joanne Parker, a known drug associate of Cravens. A check of the phone listed under Parker also indicated numerous calls made to the Matthews phone at 130 Clarkson Avenue in Brooklyn [GA 2, 8, 8a].* Similarly, intelligence on Westcott indicated him to be a major narcotics trafficker, and that the calls were made from 130 Clarkson Avenue to a residence occupied by Sally Bryant, a paramour of Westcott [GA 2, 8, 8b].

The affidavit continues with important intelligence concerning Matthews' background. The State learned through normal investigative techniques that Matthews lived at 130 Clarkson

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*GA abbreviation refers to Garay's affidavit, and numbers to paragraph numbers.

Avenue with Barbara Hinton and also that he had rented an apartment (No. 5J63) at 3333 Henry Hudson Parkway. In addition to the details of the lease at Henry Hudson Parkway, the State established that he was the owner of Mattrank Enterprises, what he alleged his salary to be, and also that he was building a house on Staten Island, the approximate cost of which was $200,000 [GA 9]. In addition to this portion of the surveillance and background check, the State kept pace with the Matthews operation by the use of confidential information, so that when Matthews "transferred his operation" to a telephone which had answering service, the State was immediately informed of this by its confidential informant. The State verified this information by calling the answering service, and by a mail check indicating a letter to Matthews from the Riverdale telephone exchange [GA 10, 10a, 10b].

Further surveillance on April 25, 1972 by Detectives Mahone and Berk observed Nat Elder in the Matthews apartment (5J63) at Henry Hudson Parkway and another car, a 1972 black Thunderbird, registered to Frank Matthews. The surveillance of May 18, 1972 traced Elder from the Henry Hudson Parkway

address to his own home at 3103 Fairfield Avenue in Bronx County. Subsequently, the authorities noted Matthews' move to Staten Island. There are other observations of Nat Elder such as those on September 3, 1971 indicating his suspicious conduct at 130 Clarkson Avenue bringing in a black attache case to the Clarkson Avenue address and leaving in a car of which the authorities obtained the make and license number. Further intelligence on Elder was obtained from other authorities and detailed in the affidavit [GA 11, 11a]. The police constantly observed 130 Clarkson Avenue, observing the automobiles used by Matthews and his associates. They linked one of the cars to an Amanda Hinton French of Durham, North Carolina; by following Matthews, they observed him double-parked in front of 150 Hawthorne Street (September 14, 1971). Subsequent information from Detective Nannery, Shield No. 1849, indicates that a Haynes Mac Donald, a noted drug dealer, operated out of the 150 Hawthorne Street address [GA 12, 13, 13a].

The affidavit contains numerous details and accounts of the travels, the methods of travel and the people involved

with Matthews. The observations of September 16, 1971 linked Matthews with Ivan Wynn, and Gattis Hinton. The authorities observed numerous people carrying suitcases in and out of Apartment 4-D, which was Matthews' apartment at 130 Clarkson Avenue [GA 14]. The background of Gattis Hinton and his travels and connections with Cravens and Ray Daniels are completely set forth in the affidavit, indicating the both monetary and narcotic connections between the parties involved [GA 15, 16, 17].

Surveillance of January 11, 1972 indicated the ability of the authorities to follow Elder from the Clarkson Avenue address to several locations ending up in Brownie's Bar at 710 St. Marks Place. There and at 715 St. Marks Place, detectives observed Elder take out large quantities of money and count it before other persons [GA 18]. Police were able to observe a meeting, thus establishing the connection of James A. Martinez, Ivan Wynn and other associates of Matthews, said meeting taking place on January 31, 1972. Such observations also indicated that one Scarvey McCargo was connected with the operation [GA 20, 21]. Through the use of Interpol,

the authorities ascertained both the driver and owner of a late model foreign car whose passanger had delivered a large green cellophane package to the Clarkson Avenue address [GA 22, 23]. The continued observations of Clarkson Avenue and Brownie's Bar and other known narcotics sites produced the names and addresses of other narcotics offenders linked with Matthews [GA 24, 25, 26, 27]. During all this furtive activity, the authorities are able to observe Elder and Matthews removing packages from a car trunk, enter 130 Clarkson Avenue, exit without the package, and go to Brownie's Bar to meet Gattis Hinton [GA 28].

Government intelligence linked Gattis Hinton with Melvin Coombs, who in turn was linked with the operation of J. C. Abraham. The information available to the authorities is both detailed and convincing and set forth in the affidavit [GA 29, 30, 31, 32].

The observations of Matthews, Elder and Hinton in suspicious activity were numerous throughout the affidavit [GA 33 and 36].

The sections of the affidavit concerning the information given to the authorities by the confidential informant are incredibly detailed and totally incriminate Matthews. These sections follow pretty much the testimony of the confidential informant as given before Justice Kapelman on June 27, 1972. It is important to note that this informant was found to be reliable by both the Bronx District Attorney, Burton Roberts, Assistant District Attorney Peter Grishman, Bureau Chief Charles E. Padgett, and Justice Kapelman.

The references in the affidavit (Garay) indicate: (1) that the confidential informant observed Frank Matthews in possession of one-half kilo of heroin in the latter part of 1971; (2) that the confidential informant was with James Westley Carter in September of 1971 when Carter had a large amount of drugs in his possession and Carter stated to the informant that he had just received them from Matthews; (3) that Carter had revealed that he was a partner of Matthews and that they pooled their money to buy drugs; (4) that the confidential informant witnessed Matthews receiving a large sum of money

in Baltimore for drugs that he sold; (t) that the confidential informant was present when, after Carter had spoken to Matthews on the telephone, Carter stated that a large shipment of drugs was on the way from New York and that Matthews had bought an expensive home in New York; (6) that one Purcell Wiley, a cousin of Carter, described his entire drug operation to the confidential informant, stating how he would obtain drugs in New York from Matthews; (7) that Wiley had told the informant on at least three occasions when he arrived in Baltimore that he had just purchased drugs from Matthews - this was obviously corroborated when Wiley was arrested at La Guardia Airport with drugs in his possession; and (8) that the confidential informant saw Matthews in possession of one-half kilo of cocaine in the summer of 1971 at the Holiday Inn in Baltimore [GA 34, 37, 38, 39, 40, 41, 42, 43, 44, and testimony of June 27, 1972]. This incredibly detailed information was demonstrated to be completely reliable through the supporting testimony of Special Agent William A. Nelson and the additional testimony of Patrolman Garay.* This corrobora-

*Exhibits in RA # 58.

tive testimony demonstrated that in fact Matthews did shift his telephone operation as per the information given, that direct buys were made by undercover agents through the auspices of this informant, and that the authorities possessed a recording of a narcotics conversation between the confidential informant and Carter. This information and its corroboration would also support the reliability of the anonymous letter which the FBI received in Atlanta, Georgia, signed "Aquarius" [GA 35].

The affidavit submitted to the Court also details the extensive toll call records which were compiled by the authorities. These records indicate that the Matthews phone was used to contact and received contacts from major drug dealers all around the country. Through these records the authorities were able to achieve the addresses, phone numbers and to substantiate the existing police reports relative to intelligence on almost every major drug dealer on the Eastern seaboard and in other parts of the country. A perusal of the toll call records listed in the affidavit would more than show the Matthews operation had been pinpointed [GA 45, 46, 47]. The extensive personal

data on Matthews taken together with the places that were frequented by both Matthews and his associates are set forth in the affidavit showing their points of contact and the ability to observe their operation [GA 48-51]. The affidavit submitted to the court in the application for the interception order attempts to demonstrate the need for the wiretap by alleging a lack of success by use of normal investigative techniques or at least claiming a very limited success [GA 52-56]. However, these paragraphs not only are in complete contradiction to the prior paragraphs which amply detail the complete success of normal investigative techniques, but contain important contradictions within themselves.

To illustrate, Paragraph 52 alleges that the authorities are "without reliable inside information" while in Paragraph 56 of the same affidavit, the same affiant alleges that "the information given to me by the confidential informant is reliable." The value of the substantial information forwarded to the authorities by the confidential informant could not possibly be disputed. Further, the reliability of the informant has been shown not only by corroborative information, but through undercover buys

and a tape of a narcotics conversation between Carter and the informant (Coleman).

The claim that physical surveillance has only had a limited success certainly calls upon the Court to ignore the detailed accounts of furtive activities, deliveries of suitcases and cellophane bags, details of the automobiles used by all parties, descriptions of meetings held by lieutenants, details of monies being paid in known narcotics hangouts, and the associations and developments of the Matthews operations as became apparent from the continuous successful physical surveillance. These paragraphs [GA 52-56] also ignore the ability to connect the various drug dealers through the records of toll calls which additionally corroborate the reliable information given by Norman Coleman. The affidavit argues somewhat facetiously, one would suspect, that Matthews may be apprised of the investigation by more surveillance. This posture is most curious when one considers that prior affidavits have already alleged that Matthews changed his "phone operations" because he thought that the phone was tapped and that he had continually

sought to evade any vehicular surveillance by erratic driving techniques.

Despite the arguments set forth in the latter paragraphs of the affidavit [GA 52-56], it is obvious that normal investigative techniques had proved eminently successful, for without even the use of the grand jury and the granting of limited immunity to lesser lights, the government had a complete knowledge of the Matthews operation, affected several arrests, and had most certainly been able to "expose the crime". See U.S. v. Kahn, supra, Footnote 12. Perhaps the true petition in the latter paragraphs of Garay's affidavit can be found in the last lines of Paragraph 52, claiming that an intercept order would allow other surveillance "to be more effectively utilized."

This brief does not dispute that the granting of an intercept order would make the job of the authorities an easier one, and perhaps permit the gathering of additional and cumulative evidence, but such is not a sufficient reason for the use of the awesome power of electronic surveillance. Indeed, even the most pro-prosecution of decisions call for a demonstration

of how or why normal investigative techniques have been or would be unsuccessful. The evidence submitted in support of "probable cause" details the outstanding success of the techniques which have resulted in successful prosecutions in this country for a great many years prior to the development of sophisticated electronic surveillance. The crime being exposed, the perpetrators identified and their criminality established, the law does not permit the use of this extraordinary arrow in the prosecution's quiver.

## POINT III

**THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S PRE-TRIAL MOTION TO SUPPRESS THE TELEPHONIC INTERCEPTIONS IN THAT THERE WAS A FAILURE TO MINIMIZE THE INTERCEPTION OF COMMUNICATIONS AS REQUIRED BY NEW YORK STATE CRIMINAL PROCEDURE LAW § 700.30 (7) AND TITLE 18, U.S.C. § 2518(5).***

On April 24, 1975 the appellant Darby together with the defendants Barbara Hinton and Marzella Webb moved the

*RA # 98.

Court for an order suppressing the telephonic interceptions pertaining to telephone number 212-884-2043 (order of June 27, 1972, Justice Kapelman) and those pertaining to telephone number 212-979-4022 (order of Justice Samuel Rabin) in that the agents conducting the telephonic interceptions failed to comply with New York State Criminal Procedure Law Section 700.30(7) and Title 18, United States Code, Section 2518(5) by failing to minimize the interception of communications. The government submitted answering papers opposing this application by the appellant, as well as the position taken in Point II of this brief.* On August 22 and August 27, 1975 the government supplemented its papers by the submission of letters to the Court and defense counsel.** On August 26 and August 28, 1975 the trial court held a "minimization hearing." On August 29, 1975 the Court issued an oral ruling denying the defendants' motions in all respects [TM 4034, 4098]. It would appear from these minutes that the Court found that there was a good faith attempt to minimize and if there was not, the remedy was not total but selective

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*RA # 76.
**RA # 92, # 95.

suppression, hence, the telephonic interceptions introduced at the trial against Darby and Barbara Hinton would be admissible under either alternative.*

With regard to the appellant Darby, the government had posed the additional argument that Darby had "no standing" to challenge the interceptions at Plant One (212-884-2043) and Plant Two (212-979-4022). United States v. Poeta, 455 F.2d 117 (C.A.2, 1971), cert. denied 406 U.S. 949 (1972); and Alderman v. United States, supra.** An initial reading of Alderman and Poeta would indicate that the government's position is correct and that Darby would not have standing to challenge the interceptions of Plant One or Plant Two. Poeta found that although Poeta's voice was intercepted, the tap was on Stepenberg's telephone and not Poeta's; therefore, Poeta did not have standing to argue an invasion of Stepenberg's rights grounded on a failure to minimize(Alderman v. United States,

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*On September 4, 1975 the Court filed a written decision [RA # 98].

**The trial court apparently did answer this question since its decision was otherwise based.

supra). This restrictive finding seems to limit an "aggrieved person" in derogation of the clear meaning contained in Title 18, United States Code, Sections 2518(10)(a) and 2510(11), and limits the exclusionary rule with respect to third parties to violations of constitutional proportions (Alderman, supra, pp. 967-968). Then came Giordano (United States v. Giordano, supra). One of the clear purposes of the ruling in Giordano was to extend the exclusionary rule to statutory violations as well as constitutional violations (Title 18, U.S.C. § 2518(10)(a) and Giordano, supra, pp. 1831-1833). Giordano clearly called for a suppression where there was a failure to satisfy any of those statutory requirements which were implemented to limit the use or employment of this extraordinary investigative device. As such, the remedy of suppression is available for the violations of the statute and not solely for the violation of an individual's constitutional rights. Hence, the appellant Darby's motion is not rooted in a violation of the defendant Hinton's constitutional rights, but in that the government failed to comply with the requirements of the statute (Title 18, U.S.C. §

2510(11) and § 2518(5). Even in the Second Circuit, the language purporting to define "aggrieved persons" undergoes a substantial change post-Giordano. As the Court found in United States v. Bynum, 513 F.2d 533 (C.A.2, 1975) at pages 534-535 "at the outset that appellant Abraham Wright . . . did not participate in the four 'extension' conversations here in dispute nor [emphasis added] did any of them have an interest in the premises at 655 Linden Blvd. They are, consequently, not 'aggrieved persons' within the meaning of 18 U.S.C. 2510(11) and 2518(10)(a)." It is therefore quite clear that a party who is a participant in an intercepted conversation or has an interest in the premises where the tapped telephone is located is an aggrieved person. See also, United States v. Capra, 501 F.2d 267, 281 (C.A.2, 1974) and United States v. King, supra, at p.506.

For the convenience of the Court, the latter portions of this Point will be divided into The Facts and The Law.

The Facts

The facts surrounding the "minimization question" contain

the usual battle of statistics taken together with a hearing (August 16, August 28, 1975)* which produced, to say the least, inconclusive testimony concerning the actions of the monitoring agents relative to their "minimization activities." Statistics were submitted by the defendant Hinton in a supplemental memorandum of August, 1975 and by the government in its letter of August 27, 1975. It was apparently conceded by the government (see Government's Memorandum of Law in Opposition to Motions of Hinton, Cameron, Darby and Webb, pp. 18-19) that non-pertinent calls were monitored particularly on Plant One, but that even with this monitoring and intercepting, the government contends that the minimization activities at both Plants One and Two "clearly met the applicable standards of good faith and reasonableness." The appellants, on the other hand, contend that the indiscriminate monitoring of non-pertinent calls, the lack of a supervising judiciary and the listening to of

*The hearing was conducted by Mr. Gino E. Gallina, the attorney for Barbara Hinton, but the motions and hearing were joined in by Mr. Jeffrey C. Hoffman, the attorney for the appellant Darby.

non-pertinent calls constitutes a violation of the minimization protection of Title III of the Omnibus Crime Control Bill of 1968. The minimization hearing certainly produced, if anything, a conflict in the testimony of the monitoring agents. Officer Garay testified [HM 19]* that the two machines that operated at the respective plants contained a pause button which if "hit" ceased the taping of the conversation but permitted the monitoring agents to still hear the telephone conversation [HM 19, 24-25]. Officer Garay later stated that on occasion they would turn down the volume on some of the non-pertinent calls [HM 27-28]. Officer Mahone testified that while he would turn off a non-pertinent conversation eventually, it was difficult for him to say how long he would listen to it before he would turn it off [HM 36]. Agent Miller, who was the last witness to testify at the hearing, stated that he was the supervising agent over the monitoring officers. Miller claimed that if a non-pertinent call came in, the monitoring agent would pull the plug, thus ceasing the machine completely. The alternative,

*"HM" refers to Hearing Minutes.

Miller stated, was to turn the volume off completely but watch an "impulse meter" which would indicate the termination of the non-pertinent call. Agent Miller clearly stated that he told the officers they were not to "listen" to non-pertinent conversations, never mind recording them. However, when the Court inquired as to whether or not any guidelines as to what was pertinent and non-pertinent were supplied to the monitoring agents, Miller stated, "we didn't, because of the type of case it was. It was extremely difficult." [HM 64].* Further, Miller stated that if there was any question in the minds of the monitoring agents as to whether or not the call was pertinent or non-pertinent, he instructed them to record it [HM 64]. Miller further admitted that the operators (monitoring agents) were not fully familiar with the ramifications of the conspiracy. The testimony of Agent Miller concludes with the difficulties he had with the case at bar and the statement that he and his officers did not report to any supervising judge nor did they actually know if anybody else did,

*An interesting comparison can be made between this testimony and Miller's affidavit submitted as part of the government's answering papers [RA # 76].

but they believed that the Assistant United States Attorney so reported [HM 71]. While the testimony at this hearing was sparse, the Court nonetheless decided the motion in favor of the government on the morning of August 29, 1975.

If any conclusions were to be drawn from the minimization hearing, they would be that:

(1) The supervising agent made a general instruction not to intercept non-pertinent calls, but did not define or attempt to define which calls were pertinent and which were not.

(2) That the government saw fit to place at Plants One and Two monitoring agents who were not familiar with the alleged conspiracy or the people allegedly involved, so that an interception of a multitude of non-pertinent calls would unquestionably be the result.

(3) That while monitoring agents may have ceased to tape a non-pertinent call, they would still continue to listen to it on the amplifier.

(4) That because of the nature of the equipment and the condition of the logs, the equipment must have been going 24 hours

a day and intercepting all calls regardless of context.

One must reach conclusion number (4) by virtue of the testimony put forth by Garay, Mahone and Miller. Since the machine involved was activated when the receiver of the target phone was picked up, and the agents wished to secure every conversation which was "phoned out" and "phoned in," the electricity feeding these machines could not be turned off least a possible pertinent call would be missed. Hence, the only credible testimony was that of Garay, who indicated that while they ceased to tape a non-pertinent call by "hitting" the pause button, they nonetheless listened to it on the amplifier. Miller's explanation that they could turn the volume all the way down but read a "meter" which would indicate when the call was terminated proved to be somewhat illusory when it was shown that the only needle on the recorder was a volume needle.

The Law

The touchstone of an analysis of the law of minimization is Berger v. New York, supra. In Berger, the Supreme Court, in overturning New York's permissive eavesdropping statute,

held in part that the State statute was unconstitutional inasmuch as it allowed general interceptions because "conversations of any and all persons coming into the area covered by the device will be seized indiscriminately and without regard to their connection with the crime under investigation." 388 U.S. at p. 59. See also, Katz v. United States, supra.

As a result of the Court's holding in Berger, Congress enacted Title III of the Omnibus Crime Control Bill of 1968 to conform to the constitutional mandate of Berger and to prevent what the Berger court characterized as a "roving commission to seize any and all conversations." 388 U.S. at p. 59.

Consequently, part of the Crime Control Bill, 18 U.S.C. § 2518(5) provides in part:

> "Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days."

The purpose of this provision was to prevent an improper invasion

of the right of privacy in violation of the Fourth Amendment, and to curtail the indiscriminate seizure of wire communications. United States v. Focarile, 340 F. Supp. 1033, 1044 (D. C. Md. 1972); United States v. Eastman, 326 F. Supp. 1038, 1039 (M. D. Pa. 1971); and Application of United States, 426 F. 2d 639 (C. A. 9, 1970).

With the mandates of the United States Supreme Court in mind, a two-fold question arises as to when and how minimization is achieved and if minimization is not achieved, what is the defendant's remedy? An analysis of the pertinent cases in this circuit, United States v. Bynum, 360 F. Supp. 400 (1973); United States v. Sisca, 361 F. Supp. 735 (1973); United States v. Principie, Slip Op. Nos. 155, 156, 213 (C. A. 2, Decided March 4, 1976), would indicate that minimization is achieved when there is a good faith effort on the part of the monitoring agents to limit the interception of innocent communications. The methods and standards used are to be viewed in light of the type of investigation, its scope, location, persons involved, etc. While the courts have given latitude to the government

agents in cases of far-flung narcotic conspiracies where the parties are numerous, the conversations guarded and coded, nonetheless, where there is an absence of any precaution to insure minimization and a lack of supervisory techniques taken together with a substantial number of non-pertinent calls being overheard, the court has found that minimization has not been achieved [Sisca at p. 745].

Perhaps the most perfect analysis of all of these cases was set forth in United States v. Tortorello, 480 F. 2d 764 (1973) at p. 784:

> "It is clear from these decisions* that a court should not admit evidence derived from an electronic surveillance order unless, after reviewing the monitoring log and hearing the testimony of the monitoring agents, it is left with the conviction that on the whole the agents have shown a high regard for the right of privacy and have done all they reasonably could to avoid unnecessary intrusion."

Under this present state of law the question arises whether or not

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*U.S. v. Scott, 331 F. Supp. 233 (D. D. C. 1971); U.S. v. King, 335 F. Supp. 523 (S. D. Cal. 1971); U.S. v. Skarloff, 323 F. Supp. 296 (S. D. Fla. 1971). See also, U.S. v. James, 494 F. 2d 1007, 1018 (C. A. D. C. 19[illegible]); U.S. v. Capra, supra, at p. 275.

the facts of our case indicate a "high regard for the right of privacy." It would appear from the rather confusing testimony at the abbreviated hearing that the witnesses were almost incapable of recalling what was done, and none had any technical knowledge to answer questions concerning the machine's operation. It was perfectly clear, however, that even though they may not have recorded some of the non-pertinent conversations, they nonetheless listened to them. Further, they received no instructions as to what was a pertinent or what was a privileged or non-pertinent conversation. In fact, as Agent Miller bluntly stated, "when in doubt record it." [HM 64]. No evidence was introduced by the government that there was a supervising judge or that anyone was reporting to a supervising judiciary at regular intervals. In fact, the evidence is quite the opposite. The agents were not reporting progress to any member of the judiciary, nor were they receiving any guidance from the judiciary. It is clear from both the statute and case law that the harm that the minimization provision seeks to eliminate is in the "listening" not in the recording. Hence,

a listening to the non-pertinent calls by the agents violated the provisions of the statute. Where there is no supervising and guiding judiciary, the supervising agent fails to provide even minimum instruction, no evidence is submitted which indicates that progress reports had been submitted to any supervising authority, the men placed at the wiretap locations are inexperienced and unfamiliar with the investigation and where the agents listened to virtually all non-pertinent calls, can it be said that the agents "have done all they reasonably could to avoid unnecessary intrusion"?

Upon demonstrating under the facts and law that the minimization provision of the statute had not been complied with, the appellant contends that the remedy is total suppression. As this circuit recently wrote in United States v. Principie, supra, the argument against selective suppression is well stated in United States v. Focarile:

> "In this court's opinion the minimization requirement of §2518(5) would be illusory if it were enforced on an item-by-item basis by means of suppressing unauthorized seizures at trial after the interception is a

> fait accompli. Minimization as required by the statute must be employed by the law enforcement officers during the wiretap, not by the court after the wiretap . . . . Knowing that only 'innocent' calls would be suppressed, the government could intercept every conversation during the entire period of a wiretap with nothing to lose by doing so since it would use at trial only those conversations which had definite incriminating value anyway, thereby completely ignoring the minimization mandate of Title III. A conversation once seized can never truly be given back as can a physical object. The right of privacy protected by the Fourth Amendment has been more invaded when a conversation which can never be returned has been seized than where a physical object which can be returned has been seized."

As the court indicates in Principie, the question of remedy has never been reached in this circuit, but it would certainly seem that selective suppression is an illusory remedy of no value to a defendant and no restraint upon the monitoring agents.

The telephonic interceptions were undoubtedly a major factor in the case against the appellant Darby. And while no one can precisely measure the effect this evidence had upon the jury, it is worthy of note that only Scarvey McCargo was convicted

without evidence from Plant One or Plant Two. Further, the five defendants who were acquitted were those whose voices were not captured at Plant One or Plant Two.* The dominant role which these taped conversations played in the case against the appellant Darby taken together with the government's failure to minimize requires a reversal of Darby's conviction on all counts.

## ADOPTION PURSUANT TO RULE 28(i) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

The case at bar involves eight appellants (originally thirteen defendants) and a variety of complex issues spread throughout the record of a two and one-half month trial. In light of these facts and to spare the Court repetitious reading, the appellant Darby would move pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure to adopt those points of argument set forth by his co-appellants as they apply to him.

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*Lucy Mathews' telephone conversation with Agent Swint at the Community Grocery Store proved to be more of a defense exhibit, in that it totally contradicted Swint's testimony as to what the conversation contained.

## CONCLUSION

The trial court's failure to suppress the telephonic interceptions on the grounds that the wiretap application was defective or that the government failed to minimize the interception of communications was grave error which resulted in the admission of illegally obtai ned evidence. This error requires a reversal of the appellant's conviction, and in light of the pivotal role of the telephonic interceptions, a dismissal of the indictment. If the Court does not see fit to grant this relief for the reasons set forth, then most certainly, the trial court's error in unlawfully discharging Juror Number Six requires a reversal of the conviction and the remanding of the matter for a new trial. The appellant John Darby respectfully moves for the relief as set forth herein.

Respectfully submitted,

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Read 3/31/76
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